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REPLY TO MOTION TO DISMISS:

1. The issue in this case is whether civil litigants can be compelled to choose between incriminating themselves on depositions or, in the alternative, be deprived of their day in court. In their Motion to Dismiss, Appellees have failed to discuss this issue except in the briefest conclusory terms, and have failed to discuss, or even to cite, a single federal authority in point 1

2. The decision below clearly did not rest upon an independent non-federal ground, since that decision explicitly and necessarily rejected Appellants' assertion that dismissal of their action was in violation of the privilege against self-incrimination 2

3. All three Appellants have standing to prosecute this appeal, and Appellees' contention to the contrary is patently frivolous 3

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 984

ERWINE LAVERNE, ESTELLE LAVERNE and LAVERNE INC.,

Appellants,

v.

INCORPORATED VILLAGE OF LAUREL HOLLOW and HOWARD CORNING, JR., individually, and as Mayor of the Incorporated Village of Laurel Hollow; and HUTCHINSON DUBOSQUE, ORIN LEACH, JOHN MACKAY and DOUGLAS DESPARD, individually, and as Trustees of the Incorporated Village of Laurel Hollow; and MARTIN DWYER, individually and as Chairman of the Planning Board of the Incorporated Village of Laurel Hollow; and HUGH JOHNSON, individually, and as Building Inspector of the Incorporated Village of Laurel Hollow; and EDWARD J. MEEHAN, individually, and as Police Sergeant of the Incorporated Village of Laurel Hollow,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, STATE OF NEW YORK

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cision. (Jurisdictional Statement, A-14) Accordingly, summary reversal of the decisions below would not be inappropriate. *Cf. United States v. Haley*, 358 U.S. 644 (1959); Stern & Gressman, *Supreme Court Practice* 196 (3d ed., 1962). However, in view of the broad importance of the constitutional issues presented (see Jurisdictional Statement, pp. 10-11), Appellants respectfully submit that plenary consideration would be preferable.

2. The decision below clearly did not rest upon an independent non-federal ground, since that decision explicitly and necessarily rejected Appellants' assertion that dismissal of their action was in violation of the privilege against self-incrimination.

Where a state court, "deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this court has jurisdiction to review the judgment." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938). A reading of the opinion of the Court of Appeals of New York makes it manifest that that court deemed the federal question to be before it, and that it actually entertained and decided that question adversely to the federal right asserted. (Jurisdictional Statement, A-14)

Moreover, it is the province of this Court to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. *Ancient Egyptian Order v. Michaux*, 279 U.S. 737, 745 (1949). Such an inquiry cannot be avoided without renouncing a jurisdiction conferred upon this Court by law and designed to protect and maintain the supremacy of the Constitution. *Ward v. Love County*, 253 U.S. 17, 23 (1920).

It is therefore immaterial that the New York Court of Appeals referred to Appellant Laverne's "totality of conduct" as justifying dismissal of his complaint. The

plain and inescapable fact is that the substance of this "totality of conduct" was Appellant's justifiable insistence upon his constitutional privilege against self-incrimination in refusing to answer questions on depositions. This is, of course, precisely the reason that the New York Court of Appeals did in fact resolve the Constitutional issue (Jurisdictional Statement, A-14). That court expressly held:

> As to plaintiff's constitutional argument that by compelling disclosure the court is denying him the privilege against self-incrimination, the issue was thoroughly discussed and resolved in *Levine v. Bornstein* (13 Misc. 2d 161 [S. Ct., 1958], aff'd 7 Ad 2d 995 [2d Dept.], aff'd without opinion, 6 N.Y. 2d 892 [1959]). (Jurisdictional Statement, A-14)

This important constitutional issue was "thoroughly discussed and resolved," however, without any reference to *Malloy v. Hogan, supra, Societe Internationale v. Rogers, supra,* or any other relevant federal authority. Thus, Appellees' assertion of an independent non-federal ground is tenable only on the hypothesis that a federal constitutional issue is rendered "non-federal" by the simple expedient of refusing to recognize federal authority in deciding the issue.

3. All three Appellants have standing to prosecute this appeal, and Appellees' contention to the contrary is patently frivolous.

Appellants in this case are seeking damages arising out of an unlawful search of their premises and an unlawful seizure of their property conducted by Appellees as public officials and individually. Appellants' interest in this litigation is substantial, and each of them has been adversely affected by the decisions of the courts below.

In addition, each of them has been, and remains, a named party of record both in the courts below and in this Court. The Notice of Appeal to the Court of Appeals of New York was filed on behalf of "Appellants" by "their"

attorneys. On the Notice form, the letter "s" was typed in (after "Appellant") and the word "their" was typed in, thereby clearly indicating that all of the named Appellants were noting an appeal. In addition, the certification of counsel in the Court of Appeals, pursuant to CPLR § 2105, was made by "counsel on the appeal for the Plaintiffs-Appellants." Further, the opinion in the Court of Appeals bears the caption, "Erwine Laverne, *et al*, Appellants." Thus, all Appellants have consistently appeared and been recognized as parties of record in the courts below.

Appellees' contention that Appellant Erwine Laverne has somehow been displaced as a party under New York law, is wholly without support in the record or in facts extraneous to the record. Under New York CPLR 5228(a), a receiver has no power and no duties and receives no property except as specified in the order of appointment.[1] Under the order referred to by Appellees, the receiver is not vested with Appellant Laverne's causes of action, but is merely empowered to "take into possession assume control of and administer or collect various claims and causes of action . . . as shall be necessary for the purposes of satisfying this judgment. . . ." (Motion to Dismiss, A-3) The receiver has not taken into possession the present cause of action, nor has he been substituted as a party in the New York courts. Moreover, his limited interest of satisfying the judgment in that case would not divest Appellant Laverne of his paramount interest in the present claim, even were the receiver to elect to "assume control" of it.

Appellant Estelle Laverne is directly affected by the decisions below. Although her complaint has not yet been dismissed, she has explicitly been warned that she will be presented with the same "choice between the

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[1] "The order of appointment shall specify the property to be received, the duties of the receiver and the manner in which they are to be performed. . . ." CPLR 5228(a).

rock and the whirlpool." As stated by the Nassau County Supreme Court:

> ". . . the views expressed and the holdings herein will be equally applicable and pertinent on any examination before trial which may hereafter be had of the plaintiff Estelle Laverne in these actions. The assertion of a claim of privilege [against self-incrimination] in a manner inconsistent with this opinion will be deemed a willful refusal sufficient to warrant a dismissal of the plaintiff's complaint."

It is therefore erroneous for Appellees to say that Estelle Laverne was "not affected" by the order and judgment of the Supreme Court of Nassau County. (Motion to Dismiss, p. 9)[2]

Appellees further contend that Appellant Laverne, Inc. has no standing to appeal because "the dismissal of its complaints in these actions was affirmed by the Appellate Division, subject to the condition that the trustee in bankruptcy should be given an opportunity to intervene," and because "no such intervention has taken place."

This argument can only be characterized as disingenuous, since Appellees have themselves correctly and successfully[3] argued in the Appellate Division in the course of this very litigation that the trustee in bankruptcy need not prosecute a suit commenced by the bankrupt prior to adjudication, and that the bankrupt may carry on a suit in its own behalf. In support of this argument, Appellees quoted from 1 *Collier on Bankruptcy*, p. 1186:

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[2] The Appellate Division dismissed the appeal of Estelle Laverne on the grounds that her complaint had not been dismissed. *Laverne v. Incorporated Village of Laurel Hollow*, 22 A.D.2d 826, 255 N.Y.S.2d 146 (2d Dept. 1964). However, that court did not modify in any way the ruling of the Supreme Court of Nassau County quoted in the text above. Accordingly, if Appellant Estelle Laverne had not joined in this appeal in the New York Court of Appeals and in this court, she would have risked being bound by that ruling as the law of the case.

[3] See Jurisdictional Statement, A-8.

> ". . . Even though title to the chose in action vests in the trustee under § 70, if the trustee, upon appointment and qualification, declines or fails to prosecute the action, the bankrupt may continue its prosecution to judgment . . . ."

Appellees also quoted from *Paradise v. Vogtlandisch Maschinen-Fabrik*, 99 F.2d 53, 55 (3d Cir. 1938): "If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment."

It is clear, therefore, that Laverne, Inc. has standing to pursue this appeal despite its bankruptcy and despite the failure of the trustee to intervene. Moreover, it is also apparent on the face of the opinions in the courts below that dismissal of the complaint of Laverne, Inc. was based in substantial part upon the reliance of its President, Appellant Erwine Laverne, upon his privilege against self-incrimination in refusing to answer questions on depositions.

CONCLUSION

Accordingly, Appellants respectfully request that the decision below be summarily reversed or, in the alternative, that the substantial and important constitutional issues presented by this appeal be given plenary consideration.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

LAVERNE ET AL. *v.* INCORPORATED VILLAGE OF LAUREL HOLLOW ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 984. Decided April 17, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment sought to be reviewed rests upon an adequate state ground.